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Jennifer Johnson, Secretary  
Board of Governors of the Federal Reserve System  
20<sup>th</sup> Street and Constitution Avenue, NW  
Washington, DC 20551

Re: ***Threshold for the Requirement to Collect Retain and Transmit Information on Funds Transfers and Transmittal of Funds (RIN 1506-AA86)***  
***71 Federal Register 35564 (June 21, 2006)***

Dear Director Freis and Ms. Johnson:

This letter is in response to the above-referenced Joint Advance Notice of Proposed Rule Making (hereinafter "Advance Notice"). The Advance Notice explains that the Financial Crimes Enforcement Network (FinCEN) and the Board of Governors of the Federal Reserve System (Board) are reviewing the threshold in the rule requiring banks and nonbank financial institutions to collect and retain information on fund transfers and the transmittal of funds. In particular, FinCEN and the Board are assessing whether the potential benefit to law enforcement of a lower threshold outweighs the potential burden to banks and other non-bank financial institutions.

The Advance Notice asks law enforcement to address the following questions: (1) To what extent have funds transfers or transmittals of funds under the \$3,000 threshold been important to law enforcement investigations and proceedings? (2) To what extent have law enforcement investigations or proceedings been hindered by the \$3,000 threshold? (3) How frequently has law enforcement identified cases where persons have structured funds or transmittals of funds to be under the \$3,000 threshold in order to evade the record keeping requirement? (4) Inasmuch as information regarding international transmittals of funds can be obtained by law enforcement without a judicial order or other similar process, how often has currently available information been assessed, and how useful was it?

In preparing this letter, we have consulted with law enforcement agents from most of the federal law enforcement agencies, including the Federal Bureau of Investigation, the Drug Enforcement Administration, the Internal Revenue Service, the United States Secret Service, and U.S. Immigration and Customs Enforcement. This letter does not purport to represent official comments of all of these agencies, but rather is meant to present a synthesis of comments received from law enforcement agents and prosecutors who are actively involved in money laundering and related investigations, and who routinely use wire transfer information in the course of their investigations. Moreover, it should be noted that, within the law enforcement community, there is a diverse range of opinions on the issues presented in the Advance Notice.

Prior to issuing the Advance Notice, FinCEN requested anecdotal evidence from law enforcement agencies related to wire transfers in amounts under \$3,000, specifically regarding the collection of originator information from U.S. financial institutions that may have been useful in law enforcement investigations. FinCEN's request indicated that this information was to support an Advance Notice of Proposed Rule Making to lower the threshold. The request was sent to the law enforcement liaisons to FinCEN, and to FinCEN's representatives at the HIFCAs. According to the Advance Notice, FinCEN received responses to this request from IRS Criminal Investigation (IRS-CI), the Drug Enforcement Administration (DEA), the Manhattan District Attorney's Office, Immigration and Customs Enforcement (ICE), Puerto Rico HIFCA, Arizona Attorney General's Office, Los Angeles HIFCA, Southwest Border HIFCA. As far as we are aware, none of these agencies have submitted formal comments for the record. However, according to the Advance Notice, all of the agencies listed above:

indicated that the additional information collected as a result of lowering or eliminating the threshold would prove beneficial to investigations of money laundering, terrorist financing, and other financial crime. These representatives of law enforcement have indicated that lowering or eliminating the threshold would promote the disruption of illegal activity and make illegal activity more expensive for perpetrators by forcing them to use costlier alternative means of transferring funds to avoid higher risks of detection for funds transfers and transmittals beneath the current threshold. *71 Federal Register* 35566 (June 21, 2006).

Our discussions with law enforcement agents and prosecutors also support the statement above. Reducing or eliminating the threshold would promote the disruption of illegal activity and make illegal activity more expensive for perpetrators. However, the Advance Notice proceeds to request responses from law enforcement to certain questions that are central to the purpose of the Bank Secrecy Act, which is, "to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism." 31 U.S.C. § 5311. With respect to those questions, law enforcement, for a variety of reasons, is limited in its ability to provide specific data to demonstrate the extent to which the \$3,000 threshold is important to law enforcement investigations and proceedings.

Our attempts to answer the questions posed are provided below:

**(1) To what extent have funds transfers or transmittals of funds under the \$3,000 threshold been important to law enforcement investigations and proceedings? Please explain.**

The anecdotal comments provided to FinCEN by law enforcement indicated that criminals are aware of the current threshold and conduct transactions in amounts under the threshold to avoid providing identification. We believe that this statement is generally true. Experienced and knowledgeable criminals do not like to link themselves to money laundering transactions by identifying themselves, so they will frequently structure their transactions to avoid having to do so. With respect to wire transfers, they will frequently structure their transactions to avoid the \$3,000 threshold or else conduct the transactions using false identification. To the extent that this is true, the usefulness of the \$3,000 logs in providing information about criminal activity may be limited. However, when criminals structure transactions to avoid the \$3,000 identification requirement, the patterns of structured transactions often lead to the filing of suspicious activity reports that lead to investigations and prosecutions. In addition, there clearly have been cases where criminals have provided certain identifying information that has proven to be very useful in criminal investigations. Moreover, there have been instances where an investigation has provided an opportunity to review a broad range of wire transfer information, and analysis of this information has disclosed important links among transactions and trend information that has proven to be very useful. As stated initially, while law enforcement has anecdotal information to support these statements, it is difficult to quantify the usefulness of the \$3,000 threshold to law enforcement.

**(2) To what extent have law enforcement investigations or proceedings been hindered by the \$3,000 threshold? What is law enforcement's experience in being able to obtain records of transactions under the \$3,000 threshold pursuant to subpoenas or search warrants? How frequently has law enforcement encountered financial institutions that do not retain records of the transactions under the \$3,000 threshold and what types of institutions are involved?**

Records of wire transfers would be extremely useful if criminals complied with the identification requirements. These records would provide complete records of all money laundering transactions above \$3,000. If this were the case, then lowering the threshold would provide even more information about money laundering transactions, not just those above \$3,000. However, as noted above, criminals generally try to avoid the identification requirements, so they frequently structure their transactions to avoid having to identify themselves. If the threshold were lowered to \$1,000, criminals may structure their transactions at even lower amounts to avoid the \$1,000 threshold. If the threshold were eliminated entirely, then criminals might shift to other methods of laundering their proceeds rather than identify themselves during the course of their transactions. Therefore, it is difficult to assess the extent to which law enforcement investigations have been hindered by the \$3,000 threshold.

As noted above, the structuring of transactions to avoid the \$3,000 identification requirement has probably assisted law enforcement in identifying money laundering transactions. The question then arises as to whether lowering the threshold to \$1,000 would assist law enforcement by causing criminals to structure to avoid the \$1,000 threshold. Lowering the threshold to \$1,000 would benefit law enforcement in that it would increase the cost of laundering money by causing money launderers to engage in more transactions to launder a sum of money, and would result in increased number of structuring transactions that could be detected by law enforcement. Yet, there are concerns that transactions structured to avoid a \$1,000 threshold would be more difficult to detect because they would be coming close to the range of ordinary non-criminal wire transfers. Consequently, there is not a consensus among law enforcement whether lowering the threshold would significantly benefit law enforcement in this regard.

With respect to the last three questions under #2, we do not have a basis for providing meaningful answers to these questions.

**(3) How frequently has law enforcement identified cases where persons have structured funds transfers or transmittals of funds to be under the \$3,000 threshold in order to evade the recordkeeping requirement? How might structuring behavior change if the threshold was lowered to \$2,000? To \$1,000?**

Law enforcement does not keep statistics that would provide accurate information on the first question posed above, but we can report that numerous cases have been identified where persons have structured funds transfers or transmittals of funds to evade the \$3,000 reporting requirement. If the threshold was lowered to \$2,000 or \$1,000, the structuring behavior would change to evade those lower thresholds. We can make this statement with confidence because certain wire remitting businesses have set their own thresholds for identification at amounts less than \$3,000, and we have seen cases of structuring where the perpetrators have structured transactions to evade those lower thresholds.

In this regard, we have a concern about the fact that various wire remitting businesses have imposed different company thresholds below \$3,000 for requiring and recording the identification of funds transmitters. While we applaud those companies for imposing compliance thresholds more rigorous than required by law, these different thresholds can have an impact on our ability to prosecute cases of structuring to avoid the \$3,000 threshold.

Under existing law, individual banks and non-bank financial institutions are free to adopt their own record-keeping thresholds significantly below the federal threshold. AFMLS is advised that certain large money transfer companies have adopted record-keeping thresholds significantly below the \$3,000 federal threshold. It is reasonable to surmise that these companies have adopted these lower thresholds at least in part because they maintain extensive operations overseas and must comply with the laws of foreign jurisdictions that have already adopted the Financial Action Task Force's (FATF) Special Recommendation VII - recommending a de minimis threshold no higher than \$1,000.

An unintended consequence of these sub-\$3,000 corporate record keeping thresholds is that they undermine the effectiveness of U.S. anti-structuring laws. *See* 31 U.S.C. § 5324(a).<sup>1</sup>

To illustrate this point, take a person who wants to transfer \$4,500.00 to Mexico without generating a record of the transaction. If the \$3,000 federal threshold applied uniformly across all bank and non-bank financial institutions, the person would have to break the \$4,500 transfer into two or more sub-\$3,000 transactions to evade the record-keeping requirement of 31 C.F.R. § 103.33(f). A transactor that broke the transaction down in this way to evade the record keeping requirement conduct could be prosecuted for structuring under 31 U.S.C. § 5324(a)(3).

However, in the absence of a uniform threshold, our would-be structurer may not be so much concerned with the \$3,000 federal threshold, as he with a lower corporate threshold set by a remitting company. For example, to transmit \$4,500 in a way that evades a remitter's \$1,000 record keeping threshold, the person would need to execute five or more sub-\$1,000 transactions. If prosecuted for structuring, the defense argument would be that the defendant did not intend to evade the federal record keeping threshold; he intended to be evade the remitting company's \$1,000 threshold. At least in some jurisdictions, such an argument *may* afford an absolute defense to a structuring charge, notwithstanding the defendant's obvious intent to structure. *See, e.g., United States v. Dollar Bank Money Market Account*, 980 F.2d 233 (3<sup>rd</sup> Cir. 1992) ("A party who thinks that reporting is required only by a bank policy does not have knowledge of the reporting requirements and the case law," and thus does not have the requisite mental intent to violate Section 5324).

The concern we express is not theoretical. FinCEN has already received input from the law enforcement community that drug traffickers and others are now structuring wires to evade such lower wire thresholds. The New York El Dorado Task Force has advised us that, because some money remitters have adopted thresholds lower than the \$3,000 federal threshold, drug traffickers are now structuring to evade these lower thresholds. IRS-CI similarly reported to FinCEN that one of its Field Offices has observed that lowering the thresholds would be of great benefit because certain money remitters have already adopted lower thresholds. As stated above, we applaud the efforts of these money remitting companies to implement strict compliance policies and procedures, but in some cases such policies can have a negative impact on our ability to prosecute structuring cases. To alleviate this situation, FinCEN and the Board could eliminate such a defense by simply requiring bank and non-bank financial institutions to adhere

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<sup>1</sup> Title 31 U.S.C. 5324(a) provides, in pertinent part, that "No person shall, for the purpose of evading . . . the record keeping requirements imposed by any regulation prescribed under . . . section 123 of Public Law 91-508 commit any of the three acts proscribed in subparts (1) through (3)." Section 123 of Public Law 91-508 is codified at 12 U.S.C. § 1953. That section authorizes the Secretary of Treasury to promulgate regulations requiring record keeping by "any financial institution (as defined in section 5312(a)(2) of Title 31) (. . .)." 12 U.S.C. § 1953(b). FinCEN has promulgated verification and recording regulations for banks and MSBs (31 C.F.R. §103.33) pursuant to this grant of authority.

to a uniform record-keeping threshold, and the lower \$1,000 threshold would make sense in this regard.<sup>2</sup>

Increasingly, prosecutors and agents investigate and charge structuring-related offenses, and thus the need to maintain effective structuring laws in the record keeping area is just as great as it is for other record keeping and reporting requirements. For example, the government recently charged a drug trafficker with breaking down wire transfers in amounts to evade the record keeping requirement in 31 C.F.R. § 103.33(f) precisely this offense. *See United States v. Jaime Ruiz-Estrella*, CR No. 04-305 DFL (E.D. Cal.). The defendant in that case was charged in a superceding indictment with breaking a \$6,000 wire transfer to Mexico into three \$2,000 wires to evade the record keeping requirement in Section 103.33(f). He was also charged with conspiracy to distribute and possess with intent to distribute methamphetamine. He pleaded guilty to both charges.

Thus, as FinCEN examines the record keeping threshold it should do so with anti-structuring laws in mind. Whatever threshold FinCEN and the Board set, they should consider requiring that all financial institutions adhere to this single, uniform record-keeping threshold.

**(4) Inasmuch as information regarding international transmittals of funds can be obtained by law enforcement without a judicial order or other similar process, how often has currently available information been accessed, and how useful was it?**

Law enforcement does not keep statistics that would provide accurate information as to how often currently available information on international transmittals of funds has been accessed. However, such information on international funds transfers, whether obtained with or without a judicial order, is critical to law enforcement investigations, and such information is frequently used in all kinds of money laundering and terrorist financing investigations and prosecutions.

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<sup>2</sup> The same issue would arise in the case of the record-keeping threshold for the purchase in currency of bank check and drafts, cashier's checks, money orders and traveler's checks. *See* 31 C.F.R. § 103.29. A financial institution that adopted a lower record keeping threshold for these transactions than the current \$3,000 threshold could effectively undermine the anti-structuring laws as applied to these transactions.

## **Conclusion**

Thank you for the opportunity to comment on this important issue. Law enforcement wants to be very clear that it understands the importance of balancing the utility of information to law enforcement and the burden of additional recording or reporting requirements on industry. Law enforcement appreciates the tremendous contributions that financial institutions are making to the security of our nation through their compliance efforts. If you have any questions or concerns, please feel free to contact me.

Sincerely,

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